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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CORY WILLIAMS, Defendant and Appellant.	E070437 (Super.Ct.No. 16CR047539) OPINION

APPEAL from the Superior Court of San Bernardino County. Cara D. Hutson, Judge. Affirmed.

Dawn S. Mortazavi, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Genevieve Herbert, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Following a probation revocation hearing, the trial court found that defendant and appellant Cory Williams violated several terms of his probation and sentenced him to the previously suspended term of three years in state prison. On appeal, defendant argues (1) he was denied his due process right to adequate notice when the trial court relied on a factual basis not included in the petition for probation revocation; (2) there was insufficient evidence to support the trial court's finding he willfully violated his probation by failing to keep the probation department informed of his residence; and (3) the trial court failed to exercise its discretion in reinstating him on probation and instead sentenced him to the suspended prison term. We reject these contentions and affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND[1]

Pursuant to a plea agreement, on September 21, 2016, defendant pleaded no contest to willfully inflicting corporal injury upon the mother of his child in violation of Penal Code[2] section 273.5, subdivision (a). In return, the trial court suspended execution

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[1] Because the factual background of the underlying criminal offense is not relevant to the issues raised in this appeal, we will not recount those details.

[2] All future statutory references are to the Penal Code unless otherwise stated.

of a three-year sentence, and placed defendant on formal probation for a period of three years on various terms and conditions of probation.

On April 6, 2017, the San Bernardino County Probation Department filed a petition to revoke defendant's probation alleging that defendant failed to (1) cooperate and follow all reasonable directives of his probation officer; (2) report to the probation department as directed; and (3) show proof of enrollment in domestic violence classes as required by the terms and conditions of his probation.

On June 21, 2017, defendant admitted to violating the terms and conditions of his probation as alleged in the petition to revoke probation. The trial court thereafter suspended execution of the three-year prison sentence and reinstated defendant on probation on modified terms and conditions.

On November 30, 2017, the San Bernardino County Probation Department filed another petition to revoke defendant's probation alleging that defendant failed to cooperate and follow all reasonable directives of his probation officer and report to probation as instructed by his probation officer.

On January 10, 2018, defendant admitted to violating the terms and conditions of his probation as alleged in the second petition. Immediately thereafter, the trial court again imposed but suspended execution of a three-year prison sentence and reinstated defendant's probation.

On April 9, 2018, the San Bernardino County Probation Department filed a third petition to revoke defendant's probation alleging that defendant violated the following

terms and conditions of his probation: (1) cooperate with the probation officer and follow all reasonable directives of the probation officers; (2) keep the probation officer informed of place of residence and cohabitants; and (3) neither use nor possess any controlled substance unless prescribed by a medical professional. The petition also described the factual basis supporting each alleged violation, as well as defendant's criminal and supervision history.

On April 9, 2018, the trial court revoked defendant's probation and set a formal probation revocation hearing.

The formal probation revocation hearing was held on April 25, 2018. Defendant's probation officer, Sarah Hernandez, and defendant both testified at the hearing. Probation Officer Hernandez (hereafter PO Hernandez) stated that she met with defendant and went over the terms and conditions of probation with him. On January 17, 2018, defendant reported to PO Hernandez, and informed her that he was homeless but staying with his aunt in Victorville. Defendant provided his aunt's address as his residence but noted that his aunt would not allow probation officers to come to her home. PO Hernandez then directed defendant to find a different residence, as his aunt's house was not acceptable, and gave defendant three weeks to provide an alternative address. She also told defendant that he would be in violation of his probation if he failed to report an alternative address.

On February 26, 2018, defendant again reported his aunt's address as his residence. Subsequently, PO Hernandez attempted to verify the aunt's address through a

home visit. When she went to the address given by defendant, she did not find defendant at that residence. PO Hernandez explained that defendant "was reporting homeless, but he was not really homeless." PO Hernandez acknowledged that defendant checked in on February 5, 2018 "as a homeless check-in" and at that time she directed defendant to provide her with a residence address.

PO Hernandez also met with defendant on January 22, 2018. Defendant admitted that he used marijuana and signed a "self-admit form." PO Hernandez informed defendant to discontinue any immediate drug use, as it could result in a violation of his probation.

PO Hernandez met with defendant again on April 3, 2018. During that meeting, defendant again admitted to using marijuana and signed a "self-admit form." Thereafter, on that same day, PO Hernandez arrested defendant for using marijuana and failing to report his address in violation of his probation. When PO Hernandez attempted to arrest defendant, he became uncooperative and yelled, screamed, and fell to the floor. Probation officers had to carry defendant to their vehicle because he refused to walk. Defendant stated that he was not going back to jail and that the probation officers would have to carry him.

PO Hernandez did not believe defendant was a viable candidate for continuing on probation because this was his third probation violation and she felt he would not cooperate with probation in the future. She recommended that the court impose the previously suspended term of three years in state prison.

Defendant testified at the formal probation revocation hearing that on January 17, 2018, he checked in with the probation department and reported that he was homeless. Because of his homeless status, defendant was directed to report to the probation department every Monday and claimed to have done so. Defendant denied indicating that he was staying at his aunt's house. Rather, he asserted that he had informed his probation officer that he was staying "house to house" at various family members' homes. Defendant stated that his probation officer "forced" him to give her an address despite his repeated statements that he was homeless and that he gave his aunt's address because that was the only address he knew. PO Hernandez also told him that if he did not give her an address, she was going to find him in violation of his probation. Defendant knew that he had "three years over [his] head," which the judge would impose if he returned to court with a violation. He claimed that he only provided his aunt's address because he feared that he would be found in violation of probation if he did not do so, and he did not want to go to jail. However, up until that point, every time he reported to probation, defendant told his probation officer that he was homeless. Defendant also claimed that he was checking in as homeless.

Defendant admitted that he knew there was a consequence for failing to abide by the terms of his probation. He denied that he was told at least five times not to report his aunt's Victorville address. Defendant also admitted that he used marijuana twice during the course of his probation and informed his probation officer of his use both times. Defendant told PO Hernandez that he had a medical marijuana recommendation, and she

informed him that he could get a medical marijuana identification card from the Department of Public Health for $200. Defendant claimed that he was arrested for violating his probation before he had an opportunity to obtain his medical marijuana identification card. Defendant was a client of the Inland Regional Center (IRC) for mental health issues and claimed he could not read.

Following argument, the trial court found defendant in violation of his probation. The court noted that defendant was incapable of following directives and that although taken separately, the violations were "little violations." Defendant had shown a lack of respect for probation and a "lack of the ability to do what the Court asks him to do, which is cooperate with probation." The court further stated that defendant should not have lied to probation about his residence. Rather, he should have continued to tell his probation officer that he was homeless and unable to provide an address. The court expressed that it did not believe defendant was forced to lie about his residence. After noting it had given defendant several opportunities on probation, the court concluded by stating: "So what the Court is making a long record of, is letting [defendant] know I've done everything I could to give him the chance to be a probationer and go about his life, but he keeps getting in his own way and so it forces the Court's hand. The court is going to impose the three years." The Court thereafter terminated defendant's probation and sentenced him to the suspended term of three years in state prison, with 314 days of credit for time served.

On April 26, 2018, defendant filed a timely notice of appeal.

III

DISCUSSION

A. *Adequate Notice*

Defendant argues his constitutional due process rights were violated because he was not given written notice that he faced revocation of his probation for resisting arrest, which he believes was the underlying factual basis for the trial court's finding he failed to cooperate with his probation officer. The People assert that defendant forfeited this claim by failing to object to the adequacy of the notice below. In the alternative, the People contend defendant's contention is without merit because the trial court considered defendant's resistance to arrest, not as an independent factual basis to revoke his probation, but as evidence that further supported the court's finding that he was incapable of following the directives of his probation officer. The People further argue any error was harmless because of the overwhelming and undisputed evidence that defendant had violated his probation.

Assuming, without deciding, defendant has not waived or forfeited his due process claim, it fails on the merits. It is well settled that trial courts are required to provide a criminal defendant with certain minimum due process protections before his or her probation is revoked, including written notice of claimed violations. (*Black v. Romano* (1985) 471 U.S. 606, 611-612; *People v. DeLeon* (2017) 3 Cal.5th 640, 647-648 [describing same due process requirements for parole revocation proceeding]; *People v. Rodriguez* (1990) 51 Cal.3d 437, 441 (*Rodriguez*), citing *Morrissey v. Brewer* (1972) 408

U.S. 471, 488-489.) Nonetheless, while a probationer is entitled to certain procedural safeguards, the due process accorded in a revocation proceeding is flexible and does not require the full panoply of procedural protections of a criminal trial. (*Black*, at pp. 612-613; *DeLeon*, at p. 648; *People v. Vickers* (1972) 8 Cal.3d 451, 457-458; *People v. Felix* (1986) 178 Cal.App.3d 1168, 1172.) A probationer's due process rights at a revocation hearing include written notice of the claimed violations of probation, disclosure of the evidence against him or her, an opportunity to present evidence, cross-examination of adverse witnesses, and a written statement by the fact finder identifying the reason for revoking probation and the evidence relied on. (*Vickers*, at pp. 458-459; *Morrissey*, at pp. 488-489.) The precise nature of revocation proceedings need not be identical if they assure equivalent due process safeguards. (*Vickers*, at p. 458.)

Here, the record demonstrates that defendant was afforded adequate notice of his conduct which violated the terms and conditions of his probation. The third revocation of probation petition alleged that defendant violated his probation by failing to (1) "Cooperate with the Probation officer and follow all reasonable directives of the probation officers"; (2) "Keep the Probation Officer informed of the place of residence and cohabitants; give written notice to the Probation Officer twenty-four (24) hours prior to any changes. Prior to any move provide written authorization to the Post Office to forward mail to the new address"; and (3) "Neither use nor possess any controlled substance unless prescribed to you by a medical professional. Medical documentation is to be given to the probation officer." The petition also detailed the factual basis that

supported each of the violations. In support of the first and second alleged violations, the petition described how defendant provided his aunt's Victorville address as his place of residence even after his probation officers had informed him it was not an acceptable place to stay. The petition also noted that when defendant's probation officer conducted a home visit at the address given by defendant, the male owner of the residence stated that he did not know anyone by defendant's name. As the factual basis for the first and third alleged violations, the petition described how on January 22, 2018, defendant admitted to using marijuana and how his probation officer directed him to discontinue marijuana immediately, but defendant again admitted to using marijuana on April 3, 2018.

At the revocation hearing, defense counsel cross-examined defendant's probation officer and questioned defendant relating to the above-listed violations, suggesting counsel was familiar with the petition and its contents. (See, e.g., *People v. Baker* (1974) 38 Cal.App.3d 625, 629 [probationer had adequate notice of alleged violations contained in supplemental probation report counsel read during recess at beginning of revocation hearing]; *People v. Buford* (1974) 42 Cal.App.3d 975, 982 [no due process violation where supplemental report prepared and apparently served at some point prior to hearing, described alleged probation violations, and defendant failed to seek continuance or additional time for preparation].) Although defense counsel objected to the resisting arrest statement made by the probation officer on relevance grounds, counsel's failure to

express surprise or seek a continuance further supports a reasonable inference defendant had actual notice of the basis for the proceeding. (See, e.g., *Buford*, at p. 982.)

At the conclusion of the probation revocation hearing, the trial court noted that it believed defendant was incapable of following directives. The court emphasized that it had previously informed defendant to follow all directives by probation and noted that it "couldn't make that any more clearer than [it] did." The court further noted that at the previous probation revocation hearing, the court had released defendant but instructed him to "do everything" that probation directed him to, including not smoking marijuana. The court explained, "If probation tells you don't smoke marijuana, and the reason I'm concerned about that term is because he's a client of IRC. So I have no idea how marijuana interacts with anything IRC is trying to accomplish with him, which is why I let that in evidence because I wanted to know more about IRC. So what he is engaging in is kind of self-destructive behavior." Immediately thereafter, the court stated, "The straw that also breaks the camel's back, telling me that he didn't listen to me when I said do everything that probation says, okay you're remanded. Now if you were kicking and screaming and yelling on the floor, forcing probation to have to physically pick you up and take you away, how in the world is that complying with probation?" The court also commented that defendant did not fall into the category of probationers who broke new laws. Instead, defendant continued to make minor probation violations. The court noted, "[I]n January, against my better judgment, he should have been violated then and sent off. But I didn't want to do that because each time he violates it's not a big probation

violation, but it is showing a lack of respect for probation. It is showing a lack of the ability to do what the Court asks him to do, which is cooperate with probation."

The trial court's explanation makes clear that in finding defendant had violated his probation, it was relying on the conditions and factual basis alleged in the petition. Contrary to defendant's contention, the court did not rely on defendant's resistance to arrest as an independent factual basis. Moreover, defendant's recitation of the trial court's statement to support his argument is incomplete and taken in isolation. The entirety of the court's statement indicates that the court found defendant violated his probation because he admitted he did not follow his probation officer's directions, as required by the terms and conditions of his probation, and because he admitted to using marijuana. The court was merely commenting—in the form of a rhetorical question—that defendant's act of resisting arrest further reinforced its conclusion. Therefore, we reject defendant's claim that the trial court relied on a ground not previously identified in any written notice.

Based on the foregoing, we find the written notice defendant received was adequate. As such, defendant's due process rights were not violated.

Further, even if defendant lacked sufficient written notice of the allegation that he failed to cooperate with probation when he resisted arrest, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) It is undisputed that the petition to revoke probation filed in April 2018 recommended revocation on the ground defendant used marijuana twice in direct violation of his probationary terms. The

trial court found that allegation true, and substantial evidence supported that finding. (See *People v. Urke* (2011) 197 Cal.App.4th 766, 773 [substantial evidence test applies to order on probation revocation hearing] (*Urke*); *Rodriguez*, *supra*, 51 Cal.3d at p. 443 [appellate court should interfere with trial court's discretion regarding probation revocation only in "'a very extreme case'"].) It was also undisputed that defendant had provided his probation officer with an address he was not residing at as his place of residence. Defendant, however, claimed that he did so because his probation officer had forced him to provide an address and his desire to remain free of prison. Nonetheless, the court explicitly rejected this claim and noted defendant should not have lied. Because the trial court based its ruling on the independent ground that defendant used marijuana twice and gave a false address to his probation officer, defendant did not suffer any prejudice from the court's finding he also failed to cooperate with his probation officer by resisting arrest.

Defendant's reliance on *People v. Mosley* (1988) 198 Cal.App.3d 1167 and *People v. Self* (1991) 233 Cal.App.3d 414, is misplaced. In *Mosley*, the reviewing court found the defendant had been denied due process because "[t]he evidentiary phase of the hearing was completed before either [the defendant] or the court was aware of the charge which ultimately constituted the basis for revocation." (*Mosley*, at p. 1174.) Thus, the defendant had no opportunity to prepare his defense. (*Ibid*.) Similarly, in *Self*, the trial court found a violation of due process where the court permitted the prosecution to amend the petition at the hearing to add a new alleged violation. (*Self*, at p. 419.) Here,

by contrast, defendant clearly had prior written notice of the allegation regarding his failure to cooperate with probation and follow all reasonable directives of his probation officer, as well as an ample opportunity to present a defense.

In sum, defendant was afforded sufficient due process, and any error was harmless beyond a reasonable doubt in light of the overwhelming evidence supporting the trial court's finding he violated the terms of his probation.

B. *Sufficiency of Evidence of Willful Violation*

Defendant also asserts that there was insufficient evidence to support the trial court's finding that he *willfully* violated probation by failing to inform the probation officer of his residence.

Section 1203.2, subdivision (a), provides that a court may revoke probation "if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her supervision." The standard of proof required for revocation of probation is a preponderance of evidence to support the violation. (*Rodriguez, supra*, 51 Cal.3d at p. 441.)

"[T]he evidence must support a conclusion the probationer's conduct constituted a willful violation of the terms and conditions of probation." (*People v. Galvan* (2007) 155 Cal.App.4th 978, 982.) The term "willful" implies "that the person knows what he or she is doing, intends to do what he or she is doing, and is a free agent." (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438 (*Jerry R.*).) "Stated another way, the term 'willful' requires

only that the prohibited act occur intentionally. [Citations.]" (*Ibid*.) A violation is not willful when the probationer is incapable of fulfilling all the terms of probation, or where unforeseen circumstances prevent the probationer from satisfying the terms of probation. (*Galvan*, at pp. 984-985; *People v. Zaring* (1992) 8 Cal.App.4th 362, 379 (*Zaring*).) "Once a probation violation occurs, the trial court has broad discretion in deciding whether to continue or revoke probation." (*People v. Jones* (1990) 224 Cal.App.3d 1309, 1315.)

"We review a probation revocation decision pursuant to the substantial evidence standard of review [citation], and great deference is accorded the trial court's decision, bearing in mind that '[p]robation is not a matter of right but an act of clemency, the granting and revocation of which are entirely within the sound discretion of the trial court. [Citations.]' [Citation.] [¶] 'The discretion of the court to revoke probation is analogous to its power to grant the probation, and the court's discretion will not be disturbed in the absence of a showing of abusive or arbitrary action. [Citations.]' [Citation.] 'Many times circumstances not warranting a conviction may fully justify a court in revoking probation granted on a prior offense. [Citation.]' [Citation.] '"[O]nly in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation. . . ."' [Citation.] And the burden of demonstrating an abuse of the trial court's discretion rests squarely on the defendant. [Citation.]" (*Urke, supra*, 197 Cal.App.4th at p. 773; accord, *Rodriguez, supra*, 51 Cal.3d at p. 443; *Buford, supra*, 42 Cal.App.3d at p. 985.)

Here, substantial evidence supports the trial court's conclusion that defendant willfully violated his probation by failing to keep probation informed of his residence. Defendant's probation officer testified that she met with defendant and went over the terms and conditions of his probation with him. She also explained that when defendant reported on January 17, 2018, he informed her that he was homeless but staying with his aunt in Victorville and provided his aunt's address as his residence. However, defendant claimed that his aunt would not allow probation to come to her residence. Defendant's probation officer then directed defendant to find a different residence, as his aunt's house was not acceptable, and gave defendant three weeks to provide an alternative address. She also told defendant that he would be in violation of his probation if he failed to report an alternative address. Nonetheless, on February 26, 2018, defendant again reported his aunt's address as his residence, and a compliance check at his aunt's address revealed that defendant did not live there.

Furthermore, defendant admitted that he had provided his aunt's address as his place of residence even though he was not residing there. Although defendant claimed he had provided his aunt's address because he feared he would go to prison if he did not provide an address, the court explicitly rejected this claim. The court stated, "He's not supposed to lie to probation" and "I just can't believe that he was forced to lie." The court also commented that defendant should have continued to report that he was homeless without providing an address. Defendant's probation officer testified that although defendant was reporting homeless, "he was not really homeless."

"[I]t is the exclusive province of the trial [court] to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the [order] is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) We do not reweigh the evidence and must draw all reasonable inferences in support of the order. (*People v. Culver* (1973) 10 Cal.3d 542, 548.)

Based on the foregoing, the trial court reasonably concluded that defendant's act of providing his aunt's address as his residence, despite not residing there, was intentional.

Defendant argues that there was insufficient evidence that his failure to keep the probation officer informed of his residence was willful because the facts show he gave the probation officer a residential address where he occasionally stayed out of fear of being imprisoned. Defendant relies on *Zaring*, *supra*, 8 Cal.App.4th 362 to support his argument. However, while the case cited involved a probationer who was found not to have violated his probation willfully, the case is distinguishable from the facts of the present case, and does not support defendant's position.

In *Zaring*, *supra*, 8 Cal.App.4th 362 the court found that the defendant had not willfully violated her probation when she arrived for her court appearance 22 minutes late, because she was confronted with last minute, unforeseen circumstances that prevented her compliance with the court's order that she arrive on time for the hearing.

The court found that there was nothing in the record to support a conclusion that defendant's conduct "was the result of irresponsibility, contumacious behavior or disrespect for the orders and expectations of the court." (*Zaring*, at p. 379.)

Unlike in this case, in *Zaring*, the defendant was prevented from complying with the on-time term of her probation by circumstances beyond her control. Specifically, the defendant was prevented from arriving at court on time due to childcare responsibilities beyond her control. Here, on the contrary, defendant reported to his probation officer, but when asked to provide an alternative address, he continued to provide his aunt's address which was not acceptable to his probation officer. Moreover, when his probation officer attempted to conduct a home compliance check at his aunt's address, defendant did not live there. There is nothing in this record to show that defendant was prevented by circumstances beyond his control from complying with the requirement he provide a current address to his probation officer or notify her that he was homeless. Defendant had control over his conduct and the circumstances of providing the information, and willfully provided an address he was not currently residing at and refused to provide an alternative address as requested by his probation officer. If defendant was homeless and had no address, as the trial court observed, defendant should not have provided any address and should have continued to state he was homeless.

Defendant also contends that he did not try to purposely deceive his probation officer or "avoid his duty to keep probation informed of his whereabouts." However, as defendant acknowledges, a willful violation simply requires that the prohibited act occur

intentionally—without regard to motive or knowledge or the act's prohibited character. (*Jerry R., supra,* 29 Cal.App.4th at p. 1438.) Defendant admitted that he lied to probation about his residence. The fact that he did so because of his purported desire to remain free of prison has no bearing on the willfulness of his violation.

Accordingly, the court's finding that defendant willfully violated probation by failing to provide his current address is supported by substantial evidence. We find the trial court did not abuse its discretion in finding defendant in violation of his probation

C. *Imposition of Suspended Sentence*

Defendant further argues the trial court failed to exercise its discretion in determining whether his minor, technical violations merited imposition of the three-year suspended sentence. In support, defendant asserts the "court stated its hands were tied in sentencing [him] once it found him in violation of his probation and it had to impose the suspended three-year sentence." It appears defendant is referring to the following comment made by the trial court at the conclusion of its lengthy findings: "So what the Court is making a long record of, is letting [defendant] know I've done everything I could to give him the chance to be a probationer and go about his life, but he keeps getting in his own way and so it forces the Court's hand. The Court is going to impose the three years." We disagree with defendant's interpretation of the record.

We review the trial court's order revoking probation for an abuse of discretion. (*People v. Butcher* (2016) 247 Cal.App.4th 310, 318.) Great deference is accorded the trial court's decision, bearing in mind that "[p]robation is not a matter of right but an act

of clemency, the granting and revocation of which are entirely within the sound discretion of the trial court. [Citations.]" (*People v. Pinon* (1973) 35 Cal.App.3d 120, 123; see *Rodriguez, supra*, 51 Cal.3d at p. 443, quoting *People v. Lippner* (1933) 219 Cal. 395, 400 ["'[O]nly in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation'"].) "'[T]he court's discretion will not be disturbed in the absence of a showing of abusive or arbitrary action.'" (*Urke, supra*, 197 Cal.App.4th at p. 773.) "[T]he burden of demonstrating an abuse of the trial court's discretion rests squarely on the defendant." (*Ibid.*)

"A probation violation does not automatically call for revocation of probation and imprisonment. [Citation.] A court may modify, revoke, or terminate the defendant's probation upon finding the defendant has violated probation. (§ 1203.2, subds. (a), (b)(1).) The power to modify probation necessarily includes the power to reinstate probation. [Citations.] Thus, upon finding a violation of probation and revoking probation, the court has several sentencing options. [Citation.] It may reinstate probation on the same terms, reinstate probation with modified terms, or terminate probation and sentence the defendant to state prison. [Citations.] [¶] If the court decides to reinstate probation, it may order additional jail time as a sanction. [Citation.] If, instead, the court decides to terminate probation and send the defendant to state prison, . . . [and] if the court originally imposed a sentence and suspended execution of it, . . . the court must order that imposed sentence into effect. [Citations.] The court ordinarily has no

authority to impose a lesser sentence in such a case. [Citation.]" (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1420-1421 (*Bolian*), italics omitted.)

"[W]hen a judge suspends execution of a prison term, the message being conveyed is that the defendant is on the verge of a particular prison commitment. Nonetheless, upon violation and revocation of probation under such circumstances, the sentencing court retains discretion to reinstate probation." (*People v. Medina* (2001) 89 Cal.App.4th 318, 323; see Cal. Rules of Court, rule 4.435(a) ["When the defendant violates the terms of probation . . . or is otherwise subject to revocation of supervision, the sentencing judge may make any disposition of the case authorized by statute."].)

The *Bolian* court observed that the standard of review in such cases is abuse of discretion, as noted above, and explained: "The decision whether to reinstate probation or terminate probation (and thus send the defendant to prison) rests within the broad discretion of the trial court. [Citations.] 'It is axiomatic that when an issue entrusted to the trial court's discretion is properly presented to the court for decision, the court must exercise its discretion: In such a case a statement or other evidence that the court believes it has no discretion, but must rule in a certain way, indicates an error so fundamental as to be said to amount to a refusal to exercise jurisdiction.' (*People v. Angus* (1980) 114 Cal.App.3d 973, 987.) 'Defendants are entitled to "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion.' (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228, quoting *People v.*

Belmontes (1983) 34 Cal.3d 335, 348, fn. 8.)" (*Bolian, supra,* 231 Cal.App.4th at p. 1421, italics omitted; see *People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1247 ["An erroneous understanding by the trial court of its discretionary power is not a true exercise of discretion"].)

"Therefore, when the record indicates the court misunderstood or was unaware of the scope of its discretionary powers, we should remand to allow the court to properly exercise its discretion. [Citations.] We need not remand, however, when the record indicates the court was aware of its discretion or the record is merely silent on whether the court misunderstood its sentencing discretion. [Citation.]" (*Bolian, supra,* 231 Cal.App.4th at p. 1421; see *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 530, fn. 13.)

The defendant in *Bolian* pleaded guilty to one count of possessing a deadly weapon (a billy club) (former § 12020, subd. (a)(1)) and admitted enhancement allegations that he had suffered two prior prison terms (§ 667.5, subd. (b)). (*Bolian, supra,* 231 Cal.App.4th at p. 1418.) The trial court sentenced the defendant to five years in prison, suspended execution of the sentence, and placed him on formal probation for five years. (*Ibid.*) Approximately 15 months later, the probation officer reported that the defendant had violated his probation by testing positive for marijuana use four times. (*Ibid.*) The probation officer recommended the court find a violation of probation and modify probation by ordering the defendant to complete a drug counseling program. (*Ibid.*) At a contested hearing on the violation, the probation officer testified that the

defendant had also violated his probation by failing to complete community service that was ordered as a condition of probation. The probation officer revised his recommendation and suggested the court modify probation by ordering the drug counseling and a "'suitable amount'" of jail time. (*Id*. at pp. 1418-1419.)

At sentencing, the defendant in *Bolian* asked the court to follow the probation officer's recommendation. The trial court questioned whether the probation officer knew that the case involved a sentence in which execution of sentence rather than imposition of sentence had been suspended and whether the probation officer understood the differences between the two dispositions. The court said, "'The difficulty is that it will be illegal for me to do, and the probation officer may not be aware of that. I would have to make a de minimis finding to do that. This isn't de minimis. And I can't. It would be illegal and improper. That's what an execution of sentence suspended is so a judge doesn't come in and undercut another judge.'" (*Bolian, supra,* 231 Cal.App.4th at p. 1419.) When the defense attorney stated it would not be illegal to reinstate probation when execution of sentence has been suspended, the court stated, "'It is. That's why they do an ESS.'" (*Id*. at p. 1420.)

The appellate court concluded the trial court's "comments implied (1) it was illegal to reinstate and modify probation for violations that were more than de minimis, and/or (2) it was illegal to reinstate and modify probation when a sentence had been imposed but execution suspended. Neither was the case. Upon finding a probation violation, the court had the broad discretion to choose between reinstatement and

termination. Moreover, whether the court had previously suspended imposition of a sentence or suspended execution of a sentence, the court still had the authority to choose between reinstatement and termination. [Citation.]" (*Bolian*, *supra*, 231 Cal.App.4th at p. 1422.) The appellate court stated that the difference between suspending imposition of sentence and suspending execution of sentence does not matter for the purpose of deciding whether to reinstate or terminate probation. "Only once the court rejects reinstatement and chooses termination will [that] difference . . . come into play." (*Ibid.*) The court concluded that a "fair reading of the [trial] court's comments demonstrates it was not aware of its discretionary power to reinstate and modify probation" and remanded "to give the court the opportunity to exercise its discretion." (*Ibid.*)

Defendant asserts that the trial court violated his due process rights when it "made it clear that regardless of the facts of the case, for a third time probation violator the court sentences the probationer to prison even if they 'put one toe out of line'" and even for minor violations. He further claims that the trial court abused its discretion "by predetermining the sentence should a violation be found." He believes that given the de minimis violations, the court should have reinstated him on probation or considered a shorter sentence.

Defendant's contentions require us to analyze the trial court's statements at sentencing. Certain presumptions also inform our analysis. "On appeal, we presume that the trial court followed established law and thus properly exercised its discretion in sentencing a criminal defendant. [Citations.] Thus, we may not assume the court was

unaware of its discretion simply because it failed to explicitly refer to its alternative sentencing choices. [Citations.]" (*People v. Weddington* (2016) 246 Cal.App.4th 468, 491-492 (*Weddington*); *Bolian, supra*, 231 Cal.App.4th at p. 1421.)

In the present matter, the record shows the trial court was aware of its sentencing discretion to reinstate defendant on probation or to sentence defendant to prison. In fact, a thorough analysis of the record and the trial court's statements at sentencing demonstrate that the court was not set on automatically revoking probation and sentencing defendant to prison but rather considered whether defendant had in fact violated his probation. In addition, the court contemplated defendant's ultimate sentence after considering all of the facts and circumstances of defendant's probation violations. When read in its entirety, the court's statements, as previously mentioned, show that it was not explaining a preconceived notion to send defendant to prison, but rather clarifying the opportunities it had provided him on probation, his repeated failures to cooperate with probation, and why it believed he should now be sentenced. The court's comments emphasized the importance it placed on probationers following the directives of the probation department and how defendant failed to meet the court's expectations.

Unlike the court in *Bolian*, which stated it would be "'illegal and improper'" for the court to reinstate probation unless the court made a de minimis finding (*Bolian, supra*, 231 Cal.App.4th at pp. 1419-1420), the court here did not say reinstatement was illegal or improper or that it did not have the discretion to reinstate probation. In analyzing the trial court's words, it is important to note that, unlike *Bolian* where the

probation officer recommended reinstating probation with modified terms, the probation officer in this case recommended terminating probation and sending defendant to prison. The court had that recommendation in mind when it heard defendant's explanation of the probation violations.

In addition, the fact that the court's remarks did not set forth all of the available sentencing options does not support the conclusion that the court was unaware of those options or the scope of its discretion. As we have explained, we may not assume the court was unaware of its discretion simply because it failed to explicitly mention its alternative sentencing choices. (*Weddington*, *supra*, 246 Cal.App.4th at pp. 491-492.) The court's conclusory remarks that it did everything it could to give him a chance on probation "but he keeps getting in his own way and so it forces the Court's hand" are not sufficient to persuade us that the court either did not understand the range of sentencing options available or felt its hands were tied because defendant was granted probation and reinstated on probation twice with execution of sentence suspended. On this record, we cannot say the court misunderstood the scope of its sentencing discretion when it terminated defendant's probation and imposed the previously suspended prison sentence.

It appears defendant's issue is not whether the trial court failed to exercise its discretion in imposing the suspended sentence but whether his de minimis violations warranted revocation of probation and imposition of the suspended sentence. We find the trial court did not abuse its discretion in refusing to reinstate defendant on probation rather than impose the previously suspended three-year prison sentence. Defendant had

repeatedly violated the terms and conditions of his probation and was previously given the opportunity to remain on probation. Further, defendant had prior convictions for first degree burglary in 2009 and attempted infliction of corporal injury on a spouse or cohabitant in 2012. As "'[p]robation is not a matter of right but an act of clemency,'" defendant had already received clemency by avoiding prison time when he was again convicted of corporal injury upon the mother of his child in 2016. (*Urke*, *supra*, 197 Cal.App.4th at p. 773.) Even after receiving a reprieve from the trial court for these first two probation violations, defendant continued to violate the terms and conditions of probation a third time. Defendant's actions demonstrate that he was no longer deserving of reinstatement of probation.

On this record, we cannot say the trial court abused its discretion when it terminated probation and ordered execution of the previously imposed sentence.

IV

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

MILLER
Acting P. J.

SLOUGH
J.